TXU Electric Company *and* International Brotherhood of Electrical Workers, AFL–CIO, CLC, Local Union 2337. Case 16–CA–20247

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The principal issue in this case is whether the Respondent violated Section 8(a)(5) of the Act by changing its past practice of annual salary plan adjustments for unit employees while it negotiated with the Union for an initial contract. The judge found that the Respondent did not violate the Act because the Respondent gave sufficient notice to the Union of the proposed change and the Union declined to request bargaining over it.[1] We agree with the judge that the Respondent was privileged to act in the circumstances of this case, which present an exception to the general requirement of an overall bargaining impasse prior to implementation of a proposal.[2] Accordingly, we dismiss the complaint in its entirety.

I. BACKGROUND

The Respondent is a public utility engaged in the business of providing electrical service in the State of Texas. The Respondent employs approximately 850 employees classified as technicians throughout its statewide system. The Union was certified on February 19, 1999,[3] as the exclusive collective-bargaining representative of a unit consisting of 26 chemistry technicians employed at the Respondent's Comanche Peak Steam Electric Station.

At the time of the Union's certification, the salaries of both unit and nonunit technicians were established by the Respondent's 1999 technician salary plan.[4] For the past 22 years, the Respondent has annually reviewed its technician salary plan to determine if adjustments are necessary by examining current market conditions, company economics, the current retention of employees, and other factors. Any changes in employee compensation were typically made in the month of December and became effective for the following year. For the past 22 years, the Respondent increased the salary range for each technician job classification annually.[5]

The Respondent and the Union began bargaining for an initial contract on May 7.[6] Jimmy Walker, the Respondent's chief negotiator, testified that at that meeting, he advised the Union that the "current wage package plan that was in effect was a status quo issue and that the structure of the plan would not change until and unless [the parties] reached an agreement on such change." The Union did not object to Walker's statement or request bargaining over the Respondent's decision.

The parties met again on July 12 at which time the Union presented a wage proposal.[7] Walker reminded the Union about his May 7 statement "regarding the status quo of wages and salary structure." Walker testified that he specifically referred to the current 1999 technician salary plan and reiterated that the "salary structure for [unit employees] would not move, until and unless we negotiated a change to that." Again the Union did not object or demand bargaining. The parties continued to meet and discuss wages and benefits at subsequent negotiating sessions, but reached no agreement.

Consistent with its past practice, the Respondent reviewed its technician salary plan and, in December, adopted a revised salary plan, referred to as the 2000 technician salary plan, which increased salary ranges by 3.6 percent. The Respondent applied the revised salary plan only to its nonunit technicians, and, as the Respondent had advised the Union in May and July, the Re-

[1] On June 9, 2000, Administrative Law Judge Pargen Robertson issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt his recommendation to dismiss the complaint.

The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In light of our agreement with the judge's finding that the Respondent did not violate Sec. 8(a)(5) as alleged, we also agree with the judge's finding that the Respondent did not violate Sec. 8(a)(1) by advising unit employees that they would not receive pay increases under the Respondent's new salary plan because their wages had to be negotiated.

[3] All subsequent dates are in 1999 unless indicated otherwise.

[4] Consistent with past practice, the amounts were set in December 1998, to be effective for 1999. We refer to these amounts as the 1999 plan.

[5] For example, salary ranges were increased by 3 percent in 1996, 3 percent in 1997, and 2 percent in 1998.

[6] The parties met approximately 20 times between May and February 2000. During this time, they exchanged a variety of proposals, but did not reach an agreement.

[7] The Union previously had requested information regarding wage issues from the Respondent.

spondent continued to apply the 1999 salary plan to unit employees.

II. THE JUDGE'S DECISION

As stated above, the judge recommended dismissal of the complaint allegation that the Respondent unilaterally changed terms and conditions of employment in violation of Section 8(a)(5) and (1) by failing to apply the 2000 technician salary plan to bargaining unit employees. The judge acknowledged that the "Respondent made changes in working conditions when it adopted a [2000] technicians salary plan and applied that plan to non-unit technicians." However, the judge concluded that the Respondent did not change working conditions *unilaterally*. The judge found that the Respondent gave notice to the Union at the first bargaining session that "it planned to maintain the [1999] technicians salary plan for unit employees pending agreement." The judge also found that the Union failed to object or demand bargaining about that decision, even though unit employees knew that the Respondent annually reviewed the technicians' salary plan in December. The judge found that the Union did not object until after the parties had negotiated over economic issues and after the Respondent announced that its 2000 plan would be applied only to nonunit employees.

According to the judge, the "Respondent did what it was legally required to do" by providing the Union with notice, on May 7, of its intent "to maintain the status quo of the [1999] plan" and by providing the Union with an opportunity to "negotiate knowing of the likelihood that Respondent would adopt a new technicians salary plan in December 1999."

The judge also recommended dismissal of the independent Section 8(a)(1) allegations of the complaint. The judge concluded that Section 8(c) protected the supervisors' statements that the Respondent planned to exclude unit employees from the 2000 technician salary plan.

III. ANALYSIS AND CONCLUSIONS

This case concerns a situation in which the status quo of a mandatory bargaining subject at the commencement of a bargaining relationship includes an annual review of wages to determine whether an increase will be given and, if so, the amount. That is, the established wage rates are not fixed for an indefinite period of time. Instead, the employer has a past practice of annually reviewing and adjusting those rates according to certain criteria. Obviously, it may continue to do so unilaterally with respect to its nonunit employees. The question before us is what must the employer do to honor its new bargaining obligation for unit employees. Unlike a fixed term and condition of employment, *the unit employees' wage rates are scheduled for review and change on a certain date even if the parties have not reached overall agreement or impasse in bargaining by that date.*

The Board addressed a similar situation in *Stone Container Corp.*, 313 NLRB 336 (1993), and recognized the need for an exception to the traditional bargaining standard of *Bottom Line Enterprises*,[8] relied on by the dissent, which requires an overall impasse in negotiations as a whole to be reached before an employer may lawfully implement a change in a past practice term of employment. The employer in *Stone Container* notified the newly-certified union that for economic reasons it could not grant employees their annual wage increase, which was to occur in April 1989 while the parties were negotiating for an initial collective-bargaining agreement. The Board found that the employer gave the union enough time to bargain over its decision, but the union made no counterproposals for an April increase and did not raise the issue during negotiations.

In dismissing the allegation that the employer violated Section 8(a)(5) by not giving an April increase in the absence of an overall impasse in negotiations, the Board stressed that the annual wage review was a "discrete event, . . . that simply happens to occur while contract negotiations are in progress . . . [and that] bargaining over the amount of such [an] increase could not await an impasse in overall negotiations." 313 NLRB at 336. The Board further stressed that the employer was not proposing to abandon permanently the annual wage review program, nor was it declining to bargain over how much of an increase, if any, it should give in April 1989. Under these circumstances, since the union did not request bargaining when notice was afforded to it, the Board determined that the employer could lawfully decline to grant the wage increase.

The Board reached a similar conclusion in *Alltel Kentucky*, 326 NLRB 1350 (1998). There the employer told the union during bargaining that, based on a wage survey it had conducted, it did not intend to increase employees' wages in January 1997 as it had done annually for the previous several years. The union failed to request bargaining over the employer's proposal not to give the January increase. Referring to *Stone Container*, the Board stated: "[A]n overall bargaining impasse is not a condition precedent to a change in a term or condition of employment where, as here, the change concerns a discrete event which is scheduled to occur during the bargaining process," 326 NLRB at 1350 fn. 4. The Board

[8] 302 NLRB 373 (1991), enfd. mem. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).

found that the January increase was such a "discrete event," and that the employer had given notice to the union that the employer did not intend to give the increase in January. As in *Stone Container*, the Board concluded: "[T]he Union's failure to request bargaining in the face of such notice defeats any claim that the Respondent unlawfully discontinued the January increase." Id. at 1350 (citations omitted).[9]

Here, just as in *Stone Container* and *Alltel Kentucky*, the Respondent's terms and conditions of employment included an annually recurring event, viz, a December wage determination for the coming year. On May 7, 1999, the Respondent realized that negotiations might still be ongoing when December 1999 rolled around. Accordingly, the Respondent gave the Union notice that, absent an agreement, its plan for unit employees for December 1999 was to continue the 1999 wages into 2000. That is, the December 1999 wage determination for the year 2000 would apply only to nonunit employees.[10] As the judge correctly found, this constituted notice of an intended change in past practice, i.e., that the review and wage adjustments of prior years would not apply to unit employees. Rather, the unit employees would receive the same amount that they received under the 1999 salary plan. In addition, the Respondent reminded the Union of its decision in July.

The Respondent gave the Union ample time in advance of the December wage event to request bargaining. Having been twice notified of the Respondent's decision not to adjust unit employees' wages in December, it was incumbent on the Union to request bargaining over that decision.[11] Yet, the Union did not do so either time the decision was announced. Thus, under the rationale of *Stone Container* and *Alltel Kentucky*, we find that the Respondent did not violate the Act when the Respondent declined to apply the 2000 salary plan to unit employees during negotiations for a collective-bargaining agreement.

The Respondent's conduct is distinguishable from the unlawful unilateral conduct of the employer in *Daily News of Los Angeles*, 315 NLRB 1236 (1994), affd. 73 F.3d 406 (D.C. Cir. 1996), cert. Denied 519 U.S. 1090 (1997), who did not give the union bargaining representative notice or opportunity to bargain before unilaterally suspending a practice of annual individual merit wage reviews for unit employees. Contrary to the dissent, the D.C. Circuit did not address the issue presented here, i.e., whether such a change would be permissible if the union had notice and opportunity to bargain about a discrete event. In affirming the Board's finding of a violation, the court rejected the company's argument that a temporary suspension of its wage practice was not a *change* in an established term of employment, but it did not directly address the view of concurring Board Members in *Daily News* that such a change would be lawful if implemented after bargaining or after the union failed to pursue an opportunity to bargain.[12]

The dissent does not dispute the adequacy of the Respondent's notice to the Union. Nor does it find that the Respondent indicated an unwillingness to bargain over the decision to maintain the 1999 salary plan in effect during the course of negotiations. Instead, the dissent argues that the rationale of *Stone Container* and *Alltel Kentucky* does not permit unilateral change in a specific bargaining subject during overall contract negotiations when the proposed change is not consistent with the past practice of annual increases and the criteria used to determine those annual changes. According to the dissent, the Respondent, unlike the employers in those cases, unlawfully abandoned its annual wage review program when it did not propose or implement the same new salary plan for unit employees that it implemented for nonunit employees in accord with its past practice and criteria.

We disagree with our colleague's analysis of the facts in this case. The Respondent did not eliminate its practice of establishing a salary plan each year. Nor did it announce to the Union that it was permanently abandoning such a practice. Instead, it told the Union that the 1999 salary plan then in effect for unit employees would remain in effect pending negotiations between the parties. Although, as noted above, this constituted notice of a change in past practice in that the unit employees would not be included in the 2000 salary plan, it did not constitute notice of an intention to permanently discontinue its past practice of annual salary reviews. In short, the Respondent's proposed change addressed the upcoming salary plan to take effect for 2000. It did not affect future years. The issue of a salary plan for the following

[9] See also *Brannan Sand & Gravel*, 314 NLRB 282 (1994), and *Nabors Alaska Drilling*, 341 NLRB No. 84 (2004).

[10] There is no allegation of 8(a)(3) discrimination.

[11] *Alltel Kentucky*, 326 NLRB 1350 (1998).

[12] We find no need to address the court's view that the employer's action in *Stone Container* did not involve any change in the wage status quo, so that the employer had no obligation to provide notice to the union and an opportunity to bargain before unilateral implementation. See *Daily News*, 73 F.3d at 413. However, the court's view of this precedent provides no support for the dissent about the nature of the bargaining obligation when the employer does propose changes upon the occurrence of a discrete annual event. The actual holding of the court is entirely consistent with our position here, i.e., that an employer cannot make unilateral changes unless it gives the union notice and an opportunity to bargain.

year, or for the duration of any contract concluded prior to then, was open for negotiation.

Contrary to our dissenting colleague, we concede nothing by recognizing that the Respondent's proposal involved a change in past practice. Indeed, we rely on that fact in concluding that because the proposed change involved an annually occurring employment term, scheduled to recur in the midst of collective bargaining, the bargaining standard of *Stone Container* applies rather than *Bottom Line*. By that standard, and in the context of a new collective-bargaining relationship, the Respondent's conduct was entirely consistent with good faith bargaining. It notified the Union of an upcoming annual recurring event and made a bargaining proposal to deal with it.

In recognizing that the Respondent was changing a past practice, we acknowledge that if the past practice had been completely followed, the employees would have received a 3.6 percent increase. In this regard, we acknowledge that this case is factually different from *Stone Container* and *Alltel*, where the employers continued to apply their past criteria, and this resulted in a zero wage increase for both unit and nonunit employees. By contrast, if the Respondent here had applied its usual criteria, the wage increase would have been 3.6 percent. However, we read *Stone Container* as standing for a broader proposition. We agree with the concurring opinion in *Daily News of Los Angeles*, 315 NLRB at 1244, that where, as here, a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event. "[T]he employer's bargaining position may be to continue the practice for that year, to modify it, or to delete it for that year." As long as the union is given notice and opportunity to bargain as to those matters, the employer can carry out the changes even if there is no overall impasse as of the time of the change. That is what happened here.

The dissent argues that our holding in this case represents a seismic break from precedent and undermines the bargaining process. It does nothing of the sort. We are not sanctioning the use of unilateral wage changes as an economic weapon during bargaining. Furthermore, we adhere to the governing principles of collective-bargaining that disfavor piecemeal bargaining and preclude unilateral implementation of a bargaining proposal unless the parties have bargained to overall impasse for an agreement as a whole. In the instance of bargaining subjects with fixed terms, the recognized limited exceptions to the obligation to bargain to overall impasse are those summarized in *Bottom Line Enterprises.*

However, this case deals with a situation in which piecemeal treatment is unavoidable, at least on an interim basis. The date for annual review and possible wage adjustment was approaching. Absent a contract on that date, the Respondent had to do *something* with respect to that matter. It could not wait for an overall impasse. In this situation, our recognition of an exception to the general principles governing collective bargaining is not at all an endorsement of piecemeal bargaining.[13] Moreover, it does not present the vices of such bargaining identified by the 7th Circuit in the passage from *Duffy Tool & Stamping v. NLRB*, 233 F.3d 995, 997 (7th Cir. 2000), quoted by the dissent. The bargaining subject of wages is not removed from the table by the employer's interim unilateral action. The general outline of an established annual wage review program remains in place, the employer remains obligated to continue to bargain about wages in negotiations for an overall contract, and the parties may include this subject with others when striking deals for a final agreement. Furthermore, the exception is by definition limited to a discrete recurring event. It provides a bargaining bridge to cross the transitional period when an employer must deal with that event while engaged in initial negotiations with a newly-recognized or certified union. The principle has no broad application or disruptive potential.

Under *Stone Container* and *Alltel*, the Respondent, having twice notified the Union of its intention to maintain the 1999 salary plan, afforded the Union ample opportunity to bargain on this particular subject. The Union failed to request bargaining at any point during the intervening 6 months. Having received no response from

[13] The dissent misleadingly argues that *Stone Container* has not been described as creating a "third exception" to *Bottom Line*. As stated above, *Bottom Line* does not involve interim bargaining obligations about a discrete event that occurs while overall contract negotiations are in progress. *Stone Container*, *Alltel*, and *Brannan Sand & Gravel* do involve this separate bargaining situation and recognize an exception permitting unilateral action if a union has notice and sufficient opportunity to bargain about the employer's proposal for dealing with this event. See *Nabors Alaska Drilling, Inc.*, 341 NLRB No. 84, slip op. at 3–5 (2004) (Board affirms judge's conclusion, expressly relying on *Stone Container*, that employer lawfully implemented changes pursuant to annual health plan review after it gave union adequate notice and opportunity to bargain). See also "Changing Heath Insurance Plans" in General Counsel's Report on Recent Case Developments, R-2464 (Nov. 8, 2002) available at www.nlrb.gov, where the General Counsel recognizes this exception: "[In *Brannan Sand and Gravel*, t]he Board stated that an employer is not obligated to refrain from implementing proposed changes in health care plans until impasse is reached in overall negotiations where the employer has a practice of reviewing and adjusting its health care plan annually. To meet the *Brannan Sand and Gravel* exception, an employer must demonstrate that it has a past practice of reviewing and adjusting its insurance plan annually, and that it gave the union adequate notice and an opportunity to bargain."

the Union, Respondent was not required to wait until the parties reached an overall impasse in negotiations before implementing the change in annual salary plans. We find, therefore, in agreement with the judge, that the Respondent did not violate the Act by declining to apply the 2000 wage increase to unit employees.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

I. INTRODUCTION

The Respondent was not privileged to unilaterally deny unit employees an annual wage increase in the absence of an overall impasse in negotiations for a collective-bargaining agreement. The majority's holding to the contrary disregards the Board's well-established principle that, absent extraordinary circumstances not present in this case, an employer must refrain from making unilateral changes to terms and conditions of employment prior to overall impasse in negotiations for a collective-bargaining agreement as a whole. In other words, an employer cannot bargain piecemeal over discrete terms and conditions of employment; instead, it must maintain the status quo of all mandatory subjects of bargaining during the course of contract negotiations. This overall impasse rule is grounded in the longstanding Supreme Court precedent of *NLRB v. Katz*, 369 U.S. 736 (1962), in which the Court held that an employer's unilateral change in a term and condition of employment that is a subject of ongoing contract negotiations is the equivalent of a refusal to bargain over that subject, and therefore violates the employer's statutory duty to bargain.

The status quo of an employer's terms and conditions of employment often includes an established program for considering and implementing wage adjustments at regular, recurring intervals. Applying the overall impasse rule to established wage adjustment programs, the Board has held that where a wage adjustment is fixed as to timing and as to criteria for determining whether an increase is warranted, but discretionary as to amount, an employer, absent overall impasse, must maintain the fixed aspects of the program and negotiate with the union over the discretionary aspect of the program, i.e., the amount of the increase.

It is undisputed that the Respondent has an established annual wage adjustment program that is fixed as to timing and criteria but discretionary as to amount. It is further undisputed that during bargaining for an initial contract, the time arrived for the Respondent to implement its annual wage increase pursuant to that program. Under these circumstances, the Respondent's duty was plain: to maintain its program and negotiate with the Union over the amount of the wage adjustment for unit employees. Instead, without having reached overall impasse, the Respondent unilaterally discontinued its wage increase program as to its unit employees and denied them the scheduled wage increase that it provided to its nonunit employees. Therefore, the Respondent violated Section 8(a)(5) and (1).

In holding to the contrary, my colleagues misinterpret *Stone Container Corp.*, 313 NLRB 336 (1993), as allowing an employer to unilaterally change a term and condition of employment during contract negotiations. In their view, *Stone Container* stands for the proposition that if the term and condition of employment, such as an annual wage adjustment program, involves a discrete event scheduled to recur during the course of bargaining, the employer may refuse to implement the program as long as it provides the union reasonable notice and an opportunity to bargain over that change. Contrary to the majority, however, the employer in *Stone Container* did not unilaterally refuse to implement the wage adjustment program itself. It maintained the program and gave the union reasonable notice and an opportunity to bargain over its discretionary aspect, the amount of the increase. Because the annual wage increase was scheduled to occur during contract negotiations, the Board found that bargaining over the discretionary amount of the increase necessarily could not await overall impasse. The Board held that the employer met its statutory bargaining duty to maintain the status quo because it applied its usual criteria and provided the union reasonable notice and an opportunity to bargain *over the amount of the increase*. The Board did not alter its well-settled principle that an employer must maintain the status quo of the wage adjustment program itself, and any proposed changes to that program must remain on the bargaining table absent overall impasse. The employer in *Stone Container* satisfied its statutory bargaining obligation. The Respondent here did not.

My colleagues' unprecedented holding, which allows employers to unilaterally change so salient a bargaining subject as annual wage adjustment programs merely because a wage increase is scheduled to occur during the

course of bargaining, is a radical and unjustifiable departure from the Board's overall impasse rule that encourages piecemeal bargaining and undermines rather than promotes stable labor relations through the collective-bargaining process. Accordingly, I dissent.

II. BACKGROUND

At the time of the Union's February 1999[1] certification as representative of the Respondent's Comanche Peak chemical technicians, the salaries of all the Respondent's chemical technicians, including those of unit employees, were established by the 1998–1999 technician salary plan. The Respondent's practice for the past 22 years has been to review the technician salary plan and increase the salary range for each job classification annually, typically in December. The Respondent's review includes an examination of current market conditions, company economics, and employee retention.

The parties began bargaining for an initial contract on May 7 and met again on July 12. At both bargaining sessions, the Respondent's chief negotiator, Jimmy Walker, told the Union that the then-current wage plan, which was the 1998–1999 plan, was a "status quo" issue that would not change unless the parties negotiated a change. The parties exchanged wage proposals and counterproposals and discussed the issue of wages during their negotiations, but they had not reached either an agreement or overall impasse by December. Consistent with its past practice, the Respondent conducted its annual December wage review and formulated a new salary plan, the 1999–2000 technician salary plan. The 1999–2000 plan provided for a wage increase of 3.6 percent, and the Respondent implemented the new wage plan at the usual time for its nonunit technicians. Contrary to its past practice, however, the Respondent did not apply the new wage plan to unit employees, but instead continued to pay them under the 1998–1999 plan. The General Counsel alleged that the Respondent's conduct in this regard violated Section 8(a)(5).[2]

III. JUDGE'S DECISION

The judge found that although the Respondent made changes in working conditions when it failed to apply the 1999–2000 plan to unit employees, it satisfied its statutory bargaining obligation by giving the Union notice of and the opportunity to bargain over its decision. The judge found that the Union did not object to the Respondent's "announced plan to maintain the status quo of the [1998–1999] plan" and did not seek to bargain over that decision by making a counterproposal. Under these circumstances, the judge concluded that the Respondent did not violate Section 8(a)(5).

IV. DISCUSSION

A. The Overall Impasse Rule

Under Section 8(a)(5) of the Act, employers commit an unfair labor practice by "refus[ing] to bargain collectively with the representatives of [their] employees." 29 U.S.C. § 158(a)(5). Section 8(d) defines the obligation to bargain collectively as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d).

Pursuant to this statutory bargaining obligation, the Board has long held that "when, as here, parties are engaged in negotiations [for a collective-bargaining agreement], an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses *a duty to refrain from implementation at all*, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (emphasis added), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994).[3] Stated another way, during negotiations for a collective-bargaining agreement, an employer must maintain the status quo with regard to all mandatory bargaining subjects absent overall impasse in negotiations.[4] The Board has recognized two limited exceptions to this overall impasse rule: "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB at 374 (alterations and internal quotations omitted); accord *RBE Electronics of S.D.*, 320 NLRB at 81.

The overall impasse rule is rooted in longstanding Supreme Court precedent and is fundamental to the Act's

[1] All subsequent dates are in 1999 unless indicated otherwise.

[2] The complaint also alleged related violations of Sec. 8(a)(1) based on the following incidents. (1) Unit employees met with Acting Manager Robert Theimer in late November, and one technician asked him what the pay increase was going to be that year. Theimer replied that the 1999–2000 salary plan did not apply to unit technicians now because their wages had to be negotiated. (2) Supervisor David Perkins told unit employees in January 2000 that they would not receive a pay increase under the 1999–2000 salary plan because of the union issue, that their pay would have to be negotiated, and that there would be no raise until there was a contract.

[3] Accord *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993); *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 973 (1979).

[4] See *Intermountain Rural Electric Assn.*, 984 F.2d at 1566; *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339–340 (1992).

purpose of fostering stable labor relations through the collective-bargaining process. In its 1962 *Katz* decision, the Supreme Court held that an employer violates the duty to bargain by unilaterally changing a term and condition of employment under negotiation, regardless of its motivation for doing so. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Court reasoned that such a change constitutes "a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." Id. at 747. Accordingly, the Court held that the employer's unilateral grant of discretionary merit wage increases was "tantamount to an outright refusal to negotiate on that subject," and therefore a violation of Section 8(a)(5). Id. at 746. Consistent with *Katz*, the Court has since recognized that the Board's overall impasse rule is grounded in the reality "that it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) (noting the Court's approval of the Board's overall impasse rule).

With one exception, the Federal courts of appeal have adopted the Board's overall impasse rule.[5] In doing so, they have recognized the importance of that rule to effectuating the Act's fundamental policy objective of fostering stable labor relations through the collective-bargaining process. Thus, the Sixth Circuit has explained that an employer's unilateral change in conditions of employment under negotiation "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home, Inc.*, 351 F.3d at 755 (quoting *Loral Defense System v. NLRB*, 200 F.3d 436, 449 (6th Cir. (1999)). The Seventh Circuit has described the Board's overall impasse rule as "important" because the "overriding goal of federal labor law is labor peace," and labor peace "is promoted when the parties to a labor dispute avoid a test of strength involving a strike or a lockout by negotiating a collective bargaining agreement," a result that the overall impasse rule fosters. *Duffy Tool & Stamping, LLC*, 233 F.3d at 997. And the First Circuit has underlined the vital nature of the overall impasse rule, explaining that to allow an employer "to remove, one by one, issues from the table" would "impair the ability [of the parties] to reach an overall agreement through compromise on particular items" and "would undercut the role of the Union as the collective bargaining representative, effectively communicating that the Union lacked the power to keep issues at the table." *Visiting Nurse Services of Western Mass.*, 177 F.3d at 59.

Only the U.S. Court of Appeals for the Fifth Circuit has failed to adopt the Board's overall impasse rule. Instead, the Fifth Circuit follows a piecemeal-bargaining approach. See *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964); *NLRB v. Pinkston-Hollar Construction Service*, 954 F.2d 306, 311–312 (5th Cir. 1992). Under this approach, an employer may implement a unilateral change to an existing employment term, even if the parties have not reached overall impasse, as long as the employer provides sufficient notice to enable the union to discuss its objections. *Pinkston-Hollar Construction Service*, 954 F.2d at 311–312.

In *Winn-Dixie Stores, Inc.*, 243 NLRB 972 (1979), the Board fully explicated its rationale for rejecting the Fifth Circuit's piecemeal-bargaining approach. The Board explained that, unlike the overall impasse requirement, which is supported by "the basic tenets established by the Court in *NLRB v. Katz* . . . and by Congress in enacting Section 8(d) of the Act," the Fifth Circuit's approach does not satisfy the statutory definition of the duty to bargain because it allows an employer "to implement any and all changes it desire[s] regardless of the state of negotiations between the bargaining representative of its employees and itself" upon simply notifying the union of the intended change and giving the union an opportunity to discuss it. Id. at 974. "[U]nder this approach," the Board concluded,

> form, rather than substance, becomes the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded and the role of the bargaining representative is effectively vitiated. We cannot endorse an approach so clearly in disparagement of the collective-bargaining process.

Id. In other words, the Board determined that the Fifth Circuit's view of the employer's collective-bargaining obligation renders that duty a mere formality. Such a view is inconsistent with the type of "give and take [negotiation] between parties carried on in good faith with the intention of reaching agreement through compromise" envisioned by the Act. Id. Instead, the Fifth Circuit's approach renders the union impotent because its disapproval of a proposed change is meaningless in the face of the employer's ability to unilaterally implement the change, in the midst of contract negotiations, despite that disapproval. Accordingly, this approach essentially allows an employer to present its

[5] See, e.g., *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003); *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 735 (D.C. Cir. 2000); *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 996–997 (7th Cir. 2000); *Visiting Nurse Services of Western Mass. v. NLRB*, 177 F.3d 52, 58 (1st Cir. 1999).

decision as a fait accompli, disguised as an opportunity to bargain. Id. at 975 ("[I]n the absence of an impasse, [the employer's] offer 'to bargain' about the wage increase [is] really more in the nature of a proposal that the [u]nion accept the increase 'or else.'"). The Board thus concluded in *Winn-Dixie Stores* that the employer's duty to bargain "[c]learly . . . requires more than going through the motions of proffering a specific bargaining proposal as to one item while others are undecided and merely giving the bargaining agent an opportunity to respond." Id. at 974.

Other Federal courts of appeal have sided with the Board in its rejection of the Fifth Circuit's approach. See, e.g., *Duffy Tool & Stamping, LLC*, 233 F.3d at 998; *Vincent Industrial Plastics, Inc.*, 209 F.3d at 735; *Visiting Nurse Services of Western Mass.*, 177 F.3d at 59. For example, in *Duffy Tool & Stamping*, the Seventh Circuit explained that the Fifth Circuit's approach "empt[ies] the duty to bargain of meaning, and this in two respects: (1) by removing issues from the bargaining agenda early in the bargaining process, it would make it less likely for the parties to find common ground; [and] (2) by enabling the employer to paint the union as impotent, it would embolden him to hold out for a deal so unfavorable to the union as to preclude agreement." 233 F.3d at 998. The court further explained:

> If by deadlocking on a particular issue the employer is free to implement his proposal with regard to that issue, he signals to the workers that the union is a paper tiger. . . . It makes it look as if the workers are actually worse off as the result of the election—which of course is what the employer, looking forward to a possible strike vote and to the eventual decertification of the union, wants them to think. By undermining support for the union, the employer positions himself to stiffen his demands in what remains of the bargaining process, knowing that if the process breaks down the union may be unable to muster enough votes to call a strike. This stiffening of terms is likely to *cause* the process to break down, since the union cannot afford, by moderating its own demands, to acknowledge that it is indeed a paper tiger.

Id. at 998–999 (citations omitted) (emphasis in original). For these reasons, the court concluded that the Board "is on sound ground in insisting that the employer bargain until it is plain that the parties are deadlocked in the negotiation as a whole . . . ." Id at 999.

B. Pursuant to the Overall Impasse Rule, an Employer's Unilateral Change to an Established Wage Practice During Ongoing Contract Negotiations is Unlawful

It is well settled that where an employer has an established system of granting wage increases that constitutes a term and condition of employment, the employer may not unilaterally change or discontinue that practice during contract negotiations prior to overall impasse. See, e.g., *Burrows Paper Corp.*, 332 NLRB 82, 84 (2000); *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155 (1998); *Rural/Metro Medical Services.*, 327 NLRB 49, 51 (1998); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1264 (1997), enfd. 176 F.3d 1310 (11th Cir. 1999); *Harrison Ready Mix Concrete Co*., 316 NLRB 242, 242 (1995); *Daily News of Los Angeles*, 315 NLRB 1236, 1237–1241 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).[6] Whether the employer has satisfied its bargaining obligation regarding a wage increase practice is determined by the answers to the following questions: (1) Does the employer's practice constitute a term and condition of employment? (2) If it does, did the employer satisfy its obligation to maintain the status quo of that practice during the course of contract negotiations? (3) If the employer did not do so, and instead instituted a change to that practice, was the change unilateral, i.e., implemented without the union's consent or in the absence of a clear and unmistakable waiver by the union of its right to bargain about the change?

For the employer's wage increase practice to constitute a term and condition of employment, it must rise to the level of an "established practice . . . regularly expected by the employees." *Rural/Metro Medical Services*, 327 NLRB at 51 (quoting *Daily News of Los Angeles*, 315

[6] Accord: *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747 (6th Cir. 2003) (affirming the Board's holding that the employer's unilateral increase in starting wages during contract negotiations constituted an unfair labor practice); *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13 (1st Cir. 1999) (affirming the Board's holding that the employer violated Sec. 8(a)(5) by unilaterally decreasing the maximum annual wage increase awarded during the course of contract negotiations with a newly certified union); *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727 (11th Cir. 1998) (affirming the Board's holding that the employer violated the Act by unilaterally reducing wage rates of bargaining unit employees and unilaterally ceasing to make payments to pension and benefit funds during negotiations for a new collective-bargaining agreement); *Bryant & Stratton Business Inst., Inc. v. NLRB*, 140 F.3d 169 (2d Cir. 1998) (affirming the Board's holding that the employer's unilateral suspension of its annual merit wage increase program during the course of negotiations with a newly certified bargaining representative was unlawful); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 653 (6th Cir. 1977) ("Because the Company unilaterally changed [its existing wage structure], instead of maintaining the status quo, the Board properly found that it had committed an unfair labor practice.").

NLRB at 1236). The Board has identified the following three criteria for making this determination: (1) the number of years the program has been in place; (2) the regularity with which raises are granted; and (3) whether the employer used fixed criteria to determine whether an employee will receive a raise and the amount thereof. Id.

If a wage increase is not pursuant to an established practice that constitutes a term and condition of employment, then the employer is not free to grant it prior to overall impasse, absent the union's consent or clear and unmistakable waiver, because to do so would constitute a unilateral change in the employees' wages. *Katz*, 369 U.S. at 746–747; *Burrows Paper Corp.*, 332 NLRB at 83–84. If, however, the employer has a wage increase practice that constitutes a term and condition of employment, the employer must maintain the status quo of that practice during the period of contract negotiations. This means that the employer must maintain the fixed aspects of that practice and bargain with the union over any discretionary aspect of the practice before granting or denying the wage increase. As the Board explained long ago in *Oneita Knitting Mills*:

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. *NLRB v. Katz*, 396 U.S. 736 (1962). *What is required is a maintenance of preexisting practices, i.e., the general outline of the program, however, the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases) becomes a matter as to which the bargaining agent is entitled to be consulted.*

205 NLRB 500 fn. 1 (1973) (emphasis added).

Thus, for example, if a wage increase has been routinely granted in the past according to fixed criteria at a regular time, the practice is a term and condition of employment, and the employer must maintain those fixed aspects of the practice during contract negotiations just as it did before the union was elected. *Daily News of Los Angeles*, 73 F.3d at 412; *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB at 155; *Rural/Metro*, 327 NLRB at 51. In this circumstance, if the amount of the increase is also fixed under the employer's past practice, the employer must continue to grant the fixed amount and is not required to bargain with the union over the amount of the increase. *Daily News of Los Angeles*, 315 NLRB at 1239 fn. 28; *Southeastern Michigan Gas Co.*, 198 NLRB 1221, 1223 (1972). If, however, the employer has retained discretion regarding the amount of the increase, it must provide the union reasonable notice and an opportunity to bargain over the proposed amount prior to the scheduled time for implementation. *Stone Container Corp.*, 313 NLRB at 336; *Vibra-Screw, Inc.*, 301 NLRB 371, 377 (1991); *Advertiser's Mfg. Co.*, 280 NLRB 1185, 1195–1196 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987); *Hanes Corp.*, 260 NLRB 557, 557 (1982), overruled in part on other grounds, *Adair Standish Corp.*, 292 NLRB 890 (1989); *Oneita Knitting Mills*, supra. If the employer fails to do so, then it has not satisfied its bargaining obligation under Section 8(a)(5).

If the employer goes further and does not even maintain the fixed aspects of its wage increase practice, then it has necessarily implemented a change to a term and condition of employment. If the employer has done so unilaterally, i.e., without the union's consent or a clear and unmistakable waiver by the union of its right to bargain about the change, then the employer's failure to bargain to overall impasse violates Section 8(a)(5). *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB at 155; *Burrows Paper Corp.*, 332 NLRB at 84. As discussed below, that is exactly what happened here.

C. Application of the Overall Impasse Rule to the Present Case Compels a Finding that the Respondent's Unilateral Change to Its Annual Wage Increase Practice Violated Section 8(a)(5)

Applying these well-settled principles to the facts of the present case compels the conclusion that the Respondent violated Section 8(a)(5) by unilaterally discontinuing its wage increase program as to its unit employees. The Respondent for 22 years has reviewed salaries annually and, based on established criteria, has typically made salary adjustments effective in the month of December. Further, as the judge found, employees were well aware of the Respondent's annual economic review practice. Under Board precedent, the Respondent's past practice was sufficiently well established to become "a term and condition of employment regularly expected by the [Respondent's] employees."[7] *Daily News*, 315 NLRB at 1236. In fact, the Respondent continued its practice in December 1999, when it completed its annual wage re-

[7] The Respondent relies on *Winn-Dixie Raleigh*, 267 NLRB 231 (1983), in support of its argument that an employer does not violate Sec. 8(a)(5) by withholding a wage increase from represented employees (and granting it to nonrepresented employees) "when the subject of wages was on the bargaining table and the employer was engaging in good faith bargaining with the union at the time it granted the increase." *Winn-Dixie Raleigh* is distinguishable, however, for the reason given by the D.C. Circuit in *Daily News of Los Angeles*, i.e., "there was no finding in that case that the employer had established fixed criteria for determining the amount of its yearly, across-the-board wage increase." 73 F.3d at 413.

view and, based on that review, implemented the 1999–2000 pay plan for nonunit employees.

Given that the Respondent's annual wage increase practice was a term and condition of employment, the Respondent was obligated, under the well-settled precedent explained above, to maintain the status quo of that practice and refrain from making unilateral changes absent overall impasse. Thus, the Respondent was required to maintain the practice's fixed aspects, i.e., the criteria used to determine whether to grant the increases and the timing of the increases, and to give the Union reasonable notice and an opportunity to bargain over the discretionary aspect of the practice, i.e., the amount of the increases. The Respondent did not meet this obligation. Instead, it decided at the outset of bargaining to freeze the unit employees' wages at the level set by the 1998–1999 plan, and it thereafter excluded them from the 1999–2000 plan, which provided for wage increases for its nonunit employees. Thus, the Respondent changed its annual wage increase practice by failing to apply its established criteria in determining whether to award its unit employees annual wage increases, and by denying them the increase they would have received under the 1999–2000 plan at the scheduled time.

Having determined that the Respondent changed a term and condition of employment, I now turn to the issue of whether the Respondent satisfied its statutory bargaining obligation before doing so. There has been no showing that the Union consented to this change or that the Union clearly and unmistakably waived its right to bargain over the change. Therefore, the Respondent's change was unilateral. Because the parties had not reached overall impasse at the time that the Respondent implemented this unilateral change, the Respondent failed to satisfy its bargaining obligation under Section 8(a)(5).[8]

D. The Majority's Unprecedented Holding is Contrary to the Overall Impasse Rule and Undermines the Substantial Policy Considerations Underlying that Rule

The majority's holding that the Respondent's unilateral change to its annual wage increase practice was lawful is a radical departure from the Board's longstanding overall impasse rule. The majority's decision eviscerates the employer's obligation to maintain the status quo of an established annual wage increase practice during contract negotiations. It thereby unjustifiably impedes the collective-bargaining process by allowing the employer to unilaterally remove the issue of changes to this crucial existing benefit from the bargaining table. My colleagues fail to state any policy basis for this substantial departure from Board precedent, despite the significant national labor policy considerations underlying the Board's overall impasse rule discussed above.

While holding that the Respondent's unilateral change was lawful, the majority concedes (1) that the Respondent's annual practice of granting wage increases each December for the last 22 years based on established criteria was a term and condition of employment; and (2) that the Respondent changed this practice before reaching overall impasse by failing to apply its established criteria in determining whether to grant a wage increase to its unit employees. Thus, my colleagues do not deny that the Respondent unilaterally implemented a change in a term and condition of employment before reaching overall impasse. Nonetheless, they contend that the Respondent's unilateral change was lawful under the rationale of *Stone Container Corp.*, 313 NLRB 336 (1993). My colleagues' error lies in their assertion that *Stone Container* stands for the "broader proposition" that if a term and condition of employment, such as an annual wage adjustment program, involves a discrete event scheduled to recur during the course of bargaining, the employer may refuse to implement the entire program as long it provides the union reasonable notice and an opportunity to bargain over the change. They further assert that *Stone Container* therefore carved out a "third exception" to the *Bottom Line* overall impasse rule.[9] Their interpretation is contrary to a plain reading of that case.

In *Stone Container*, the employer, like the Respondent, had an established annual practice under which it routinely granted wage increases at the same time each year according to the results of its annual wage survey in an amount determined at its discretion. Accordingly, in

[8] Accordingly, the statements of Supervisors Theimer and Perkins, informing unit employees that they would not receive the scheduled increases under the 1999–2000 plan because their wages had to be negotiated with the Union, were not accurate statements of the Respondent's bargaining obligation. These statements essentially placed the blame on the Union for the Respondent's own unlawful failure to follow its prior practice. The statements were coercive and therefore violated Sec. 8(a)(1). See *Rural/Metro Medical Services*, 327 NLRB at 50; *Lamonts Apparel*, 317 NLRB 286, 288 (1995); *Harrison Ready Mix Concrete Co.*, 316 NLRB at 242.

[9] Significantly, neither the Board nor any court has described *Stone Container*, in the decade since its issuance, as establishing a third exception to the *Bottom Line* overall impasse rule. Rather, the Board and the courts have continued to recognize only two exceptions to this rule, i.e., the "economic exigency" exception and the "dilatory tactics" exception. See, e.g., *Duffy Tool & Stamping, LLC*, 233 F.3d at 997 ("[U]nless the union takes steps to delay or avoid bargaining or if the alteration is necessary to avoid serious hardship to the employer," an employer may not unilaterally change existing terms and conditions of employment absent overall impasse.); *Vincent Industrial Plastics, Inc.*, 209 F.3d at 734 (noting the only two exceptions to the Board's overall impasse rule); *Register-Guard*, 339 NLRB 353, 354 (2003) (reiterating that the Board has recognized only two limited exceptions to the overall impasse rule).

order to maintain the status quo, the employer was required to maintain the fixed aspects of its practice during the course of contract negotiations, i.e., the timing and criteria aspects, and it was also required to provide the union reasonable notice and opportunity to bargain over the discretionary aspect, i.e., the amount of the increases, before implementing the wage increases, if any, at the usual time. The Board recognized that "the April wage increases . . . were annually occurring events and thus *bargaining over the amount of such increases* could not await impasse in overall negotiations." Id. at 336 (emphasis added). The Board held that the employer met its bargaining obligation because rather than "declining to bargain over how much of an increase, if any, it should give in April 1989," the employer "expressed its willingness to discuss the subject [with the union], conducted its 'annual wage and benefit survey,' and proposed giving no wage increase because, in its view, financial circumstances did not justify one at that time." Id.

Accordingly, the Board's holding in *Stone Container* is fully consistent with the *Bottom Line* overall impasse rule. Far from establishing a "third exception" to that rule, the *Stone Container* Board expressly distinguished *Bottom Line* on the basis that the employer in that case "*unilaterally discontinued* its contributions to the union's health and welfare and pension trust funds; thus, the employer's unilateral implementation concerned a proposal, which was one of the subjects that was part of the negotiations for an overall agreement." Id. (emphasis added). The Board also expressly distinguished *Daily News of Los Angeles* on the same basis, explaining that "[b]ecause the Respondent simply made a decision here regarding the particular wage increase and did not purport to terminate the annual wage review practice, the circumstances here are distinguishable from those in *Daily News of Los Angeles*." Id. at 336 fn. 7. Thus, the *Stone Container* Board did not apply the *Bottom Line* overall impasse rule because the employer in *Stone Container* did not discontinue an established employment practice during contract negotiations; rather, it complied with its obligation to maintain the status quo of its annual wage increase practice.

Indeed, the only reason why any bargaining duty attached to the April wage increases in *Stone Container* was that the employer had retained discretion over the amount of the increases and therefore had to give the union an opportunity to bargain over that discretionary aspect. If the amount of the increases had also been fixed (e.g., 4 percent every year), then it would have been required to provide the increases in that amount at the scheduled time, and no bargaining with the union would have been required. At least that has been the rule up until today. See *Daily News of Los Angeles*, 315 NLRB at 1239 fn. 28; *Southeastern Michigan Gas Co.*, 198 NLRB 1221, 1223 (1972). My colleagues, however, now hold that where "a discrete event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that it plans to make changes as to that event." Under this holding, an annual wage increase totally fixed in all respects may be unilaterally discontinued upon notice to the union. *Stone Container* cannot be stretched that far.

The majority's confusion partially rests in its failure to recognize that the "annually occurring event" in *Stone Container* was, as identified by the Board in that case, the "April wage increases," not the employer's entire annual wage increase program. As explained above, the *Stone Container* Board recognized the reality that bargaining *over the amount of the increases* could not await overall impasse because the increases were scheduled to occur during contract negotiations. Id. at 336. The majority misconstrues the *Stone Container* Board's recognition of this fact as providing authorization for the Respondent to unilaterally suspend its annual wage increase program, as applied to unit employees, upon notice to the Union. However, as explained above, the *Stone Container* Board based its holding on the fact that the employer did not discontinue its annual wage increase practice, but instead properly maintained the fixed aspects of that practice while bargaining with the union over the discretionary amount of the increases. Clearly, had the employer in *Stone Container* unilaterally discontinued its established practice prior to overall impasse, as the employers did in *Bottom Line Enterprises* and *Daily News of Los Angeles*, and as the Respondent did in the present case as to its unit employees, the Board would have applied the *Bottom Line* standard and found such a unilateral change to be unlawful.

Thus, contrary to my colleagues, S*tone Container* does not stand for the "broader proposition" that an employer is free to unilaterally change a term and condition of employment that involves a discrete event scheduled to recur during the course of bargaining. To the contrary, S*tone Container* is consistent with the Board's longstanding overall impasse rule, grounded in the *Katz* doctrine, that employers must maintain the status quo of terms and conditions of employment during the course of contract negotiations absent the union's consent or overall impasse.

Similarly, in *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998), upon which the majority also relies, the employer had an established annual wage increase practice. The employer decided not to grant a scheduled increase dur-

ing the course of contract negotiations based on the results of a wage survey that showed that its current wage scale was higher than the market average. The employer gave the union reasonable notice and an opportunity to bargain over its proposal of a zero percent wage increase, and the union did not submit any counterproposals on the issue. Thus, as in *Stone Container*, the employer provided the required notice and opportunity to bargain *over the amount* of the scheduled wage increase, and the Board therefore found that it had satisfied its bargaining obligation. Id. at 1350–1351.

Again, in *American Packaging Corp.*, 311 NLRB 482 (1993), decided earlier in the same year as *Stone Container*, the employer had an established practice of granting production-based bonuses every September 1 based on its review of the past year's costs and profits. During contract negotiations, the union informed the employer that the employer should apply its established formula and that the union did not expect a bonus to be paid to unit employees if one was not paid to the nonunion employees. As requested, the employer applied its established formula and determined that no bonus was earned by any of its employees. The Board found that the employer did not act unlawfully because it had not discontinued its established practice; rather, it bargained with the union, the union waived its right to bargain about the bonus amount, and the employer, in applying its established formula, "legitimately determined that no year-end bonus was earned for 1990." Id. at 483. Thus, in *American Packaging*, as in *Stone Container* and *Alltel Kentucky*, the Board found that the employer had satisfied its bargaining obligation because it had maintained the status quo of its annual pay adjustment practice and had given the union reasonable notice and opportunity to bargain over the amount of the scheduled adjustment.

Significantly, in *Daily News of Los Angeles*, 73 F.3d at 413, the D.C. Circuit rejected the overbroad interpretation of *Stone Container* now espoused by the majority. The court was reviewing the Board's supplemental decision on remand (*Daily News of Los Angeles*, 315 NLRB 1236 (1994)), in which the Board reaffirmed its prior conclusion that the employer's unilateral discontinuance of its annual merit wage increase practice during contract negotiations violated Section 8(a)(5). In the Board's split decision as to rationale, Chairman Gould and Member Browning distinguished *Stone Container*, supra, and *American Packaging*, supra, explaining that "the critical distinction between the present facts and those operative in [those two cases] is that the latter two employers applied the preexisting system for granting raises while the Respondent did not." *Daily News*, 315 NLRB at 1240. Thus, "[t]he absence of increases in *Stone Container* and *American Packaging* flowed from the employers' application of their merit review program, not, as here, from the Respondent's unilateral decision to withhold raises even if the raises would have been given under an application of the preexisting merit raise program." Id. In concurrence, Members Stephens and Cohen posited, as my colleagues do in the present case, that under *Stone Container*, "[w]here there is a past practice concerning an annual event (e.g., an annual wage increase), and the event is scheduled to recur during negotiations for a contract," id. at 1243, an employer may unilaterally "modify" or "delete" the employment practice itself for the current year, as long as the employer provides the union reasonable notice and an opportunity to bargain before doing so. Id. at 1243–1244 & fn. 1. However, Members Stephens and Cohen concurred as to the result reached by their colleagues on the basis that the *Daily News* had not provided the union reasonable notice and opportunity to bargain. Id. at 1244.

On review, the D.C. Circuit rejected the concurrence's view and adopted Chairman Gould's and Member Browning's rationale, agreeing that *Stone Container* and *American Packaging* were distinguishable on the basis that in each case "the employer did not suspend the program, but rather applied its usual evaluation criteria before deciding that no increases were justified." *Daily News of Los Angeles*, 73 F.3d at 413. The court agreed that unlike the employers in those two cases, who did not change their existing practices, the *Daily News* had unlawfully changed its annual wage increase practice by failing to apply its fixed criteria in determining whether to grant merit increases. Id. ("*Daily News* . . . could not make an across-the-board policy determination based on non-merit criteria. . . . By ignoring the established criteria for making its wage-increase decisions, the Company changed a fixed aspect of the policy.").

The D.C. Circuit also rejected the argument, resurrected by my colleagues, that an employer's unilateral change to an annual wage increase practice is permissible under *Stone Container* if it is not a "permanent" policy change, but instead a change for the current year only. Id. at 414 fn. 8. Specifically, the court rejected *Daily News'* assertion that its actions were similar to those found lawful in *Stone Container* and *American Packaging* given that "its decision to stop granting the wage increases was not a permanent policy change." Id. As the court explained, this purported distinction between a permanent and temporary change is one without a difference under the *Bottom Line* standard because a unilateral suspension of an established employment practice is a change in a term and condition of employment and is therefore unlawful "regardless of how long the suspen-

sion lasts." Id. (citing *UAW v. NLRB (Udylite Corp.)*, 455 F.2d 1357, 1365 (D.C. Cir. 1971), in which the court found a violation even though the unilateral suspension of a merit review plan lasted less than 5 months).

The D.C. Circuit's conclusion in this regard is unassailable. An employer cannot excuse such unilateral conduct on the basis that it remains willing to bargain with the union over a particular term and condition of employment *after* the employer has suspended it. The unilateral suspension injures the bargaining process and undermines the union by shifting the baseline of negotiations as to a mandatory subject of bargaining. By taking away an existing benefit, the employer forces the union into the position of having to bargain to get it back, instead of the employer having to negotiate to change it. Accordingly, in the present case, the Respondent's unilateral change in its annual wage increase practice was unlawful, regardless of whether it was implemented for the current year only or future years as well.[10] The majority's authorization of such unilateral action profoundly damages the give-and-take nature of the bargaining process that the overall impasse rule is meant to foster and protect.

Finally, my colleagues erroneously contend that once the Respondent had provided the Union with reasonable notice and an opportunity to bargain about the proposed change to its annual wage increase practice, it was incumbent upon the Union to request bargaining over that proposal. This contention ignores the Board's well-settled principle that during contract negotiations, "a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be deemed to have waived its bargaining rights." *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991); accord: *Bottom Line Enterprises*, 302 NLRB at 374 ("Absent exceptional circumstances, an employer may not justify a unilateral implementation of a proposal on a particular subject, submitted during negotiations for a labor agreement . . . , on the ground of a union's failure to request bargaining on that subject."). This is "[b]ecause the parties are in fact bargaining on various proposals, [and therefore] there is no need for additional requests for bargaining on those proposals." *Intermountain Rural Electric Assn.*, 305 NLRB at 786; accord: *Pleasantview Nursing Home, Inc.*, 351 F.3d at 756–757 ("In a [contract] negotiation, a party need not respond to every statement with a forceful rejection and insistence on further bargaining; further bargaining is assumed and a waiver of the issue will not be presumed unless it is clear and unmistakable."). Instead of applying these principles, my colleagues mistakenly apply the standards relevant to a setting where contract negotiations are not ongoing, where "it is incumbent upon a union to request bargaining when it receives sufficient notice to permit meaningful bargaining over an employer's proposal to change terms and conditions of employment." *Intermountain Rural Electric Assn.*, 305 NLRB at 786.

It is uncontested that the parties in the present case exchanged wage proposals and counterproposals and discussed the issue of wages during their negotiations for an initial contract, but they had not reached an agreement at the time the Respondent unilaterally denied the wage increase to its unit employees. Pursuant to the applicable standard in the contract negotiation setting, the Union was not obliged to request additional bargaining regarding the Respondent's announced intention to change its annual wage increase practice. Absent a clear and unmistakable waiver by the Union on this issue, which it undeniably did not give, the Respondent was prohibited from unilaterally implementing the change, and the Union was entitled to rely on that prohibition all the way to overall impasse.

My colleagues' holding to the contrary essentially adopts the Fifth Circuit's piecemeal-bargaining approach, discussed above, as to actions qualifying as "discrete events scheduled to occur during the course of bargaining," despite the universal rejection of that approach by the Board and other Federal courts of appeal. As explained by the Board in *Winn Dixie*, supra, this approach, which requires the employer to do nothing more than provide reasonable notice and an opportunity to bargain before implementing a change in a term and condition of employment, renders the employer's bargaining obligation during contract negotiations a mere formality, since the employer is free to implement its desired change regardless of the union's response. It therefore essentially allows the employer to present its proposal to change an established employment practice as a fait accompli.

Furthermore, my colleagues' approach effectively authorizes employers to use a unilateral change in an annual wage increase practice during contract negotiations as an economic weapon, despite decisions of the Board and the D.C. Circuit to the contrary. In *Daily News of Los Angeles*, 979 F.2d 1571, 1576–1578 (D.C. Cir. 1992), the D.C. Circuit invited the Board to consider on remand whether the employer was free to deny scheduled merit wage increases to its unit employees, while provid-

[10] Moreover, my colleagues' premise that "the Respondent's proposed change addressed the upcoming salary plan to take effect for 2000 . . . [and] did not affect future years" is inaccurate. The Respondent *indefinitely* suspended its wage increase practice as to its unit employees when it informed the Union that it would freeze unit employees' wages by continuing to apply the 1998–1999 plan until such indeterminate time as the parties negotiated a change to that plan.

ing such increases to its unrepresented employees, as a legitimate economic weapon pursuant to *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), and *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). The Board answered this question in the negative. *Daily News of Los Angeles*, 315 NLRB at 1243. The Board explained that "while the Supreme Court has made clear . . . that the Board is not warranted in becoming involved in the substantive aspect of the bargaining process by functioning as an arbiter of the sort of economic weapons the parties may use in seeking acceptance of their bargaining demands, it is also clear that not all economic weapons seriously affecting employee rights may be employed with impunity merely because employed in aid of one's bargaining position." Id. at 1242–1243 (internal quotations and citations omitted). The Board pointed out that the Court in *Katz* "was careful to note that the availability of economic weaponry under *Insurance Agents* is subject to one crucial qualification—the party utilizing it must at the same time be engaged in lawful bargaining. Thus, . . . *Katz* made clear that the Board 'is authorized to order the cessation of behavior which is in effect a refusal to negotiate.'" Id. at 1243 (quoting *Katz*, 369 U.S. at 747). The Board concluded that the employer's unilateral action of discontinuing merit wage increases was inconsistent with the right to bargain collectively under Section 8(a)(5) and therefore not a legitimate economic weapon. Id. at 1242–1243.

On review, the D.C. Circuit agreed unreservedly with the Board's analysis in this regard, explaining as follows:

> In this case, as in *Katz* itself, the unilateral action of the employer constitutes a refusal to negotiate to impasse over a mandatory subject of bargaining, which is a violation of [S]ection 8(a)(5) precisely because such an action impermissibly interferes with the collective bargaining process. It is clear beyond a doubt that the Company's action cannot fall within *Insurance Agents* or *American Ship* because, in refusing to negotiate over a mandatory subject, the employer is evading the duty to bargain. Nothing in *Insurance Agents*, *American Ship* or *Katz* allows an employer to refuse to bargain over a mandatory subject by simply declaring the refusal to be an "economic weapon" or tactic to gain leverage in negotiations. To condone such a proposition would make a mockery of the bargaining process.

Daily News of Los Angeles, 73 F.3d at 414. Accordingly, an employer's unilateral change, midstream in contract negotiations, to an annual wage increase practice is unlawful because it constitutes a refusal to bargain to overall impasse over a mandatory subject of bargaining. My colleagues' condonation of this behavior now places a powerful and *heretofore unlawful* economic weapon in the hands of employers. By allowing an employer to unilaterally manipulate an existing term and condition of employment to its advantage in the midst of collective bargaining, and thereby shift the baseline of negotiations as to that term and condition of employment, my colleagues' holding subverts the give-and-take nature of the collective-bargaining process that the Board's longstanding overall impasse rule, grounded in *Katz*, is meant to foster and protect.

V. CONCLUSION

Under the Board's overall impasse rule, the Respondent violated Section 8(a)(5) and (1) by unilaterally changing a term and condition of employment during negotiations for a collective-bargaining agreement. Despite the Board's well-established rule prohibiting such conduct, the majority holds that merely because an event is scheduled to recur during contract negotiations pursuant to an employer's past practice, the employer may lawfully implement a wholesale change to the practice itself so long as it satisfies the empty formality of providing notice to the union of its intent to do so. This holding represents an unprecedented and radical departure from the Board's overall impasse rule that undermines the important national labor policy on which that rule is based: to foster industrial peace through the collective-bargaining process by preventing an employer from removing issues from the bargaining table in the midst of contract negotiations, thereby impairing the parties' ability to reach an overall agreement. The predictable tendency of my colleagues' decision, I fear, will be to drive the clash of interests between management and labor away from the give and take of the bargaining table into more economically disruptive avenues of collective action.

Dated, Washington, D.C. December 16, 2004

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Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Linda Campbell Reeder, Esq., for the General Counsel.
David C. Lonergan, Esq. and *Alicia Voltmer, Esq.,* of Dallas, Texas, for the Respondent.
Jon Gardner, of Ft. Worth, Texas, for the Charging Party.

DECISION*

STATEMENT OF THE CASES

PARGEN ROBERTSON, Administrative Law Administrative. This hearing was held in Ft. Worth, Texas, on March 27, 2000. Respondent, the Charging Party, and the General Counsel were represented and were afforded full opportunity to be heard, to examine witnesses and to introduce evidence. The General Counsel filed a motion to sever Cases 16–CA–19810, 16–CA–19810–2, 16–CA–19895, and 16–CA–20210–2 from Case 16–CA–20247. That motion is granted.[1] The charge in Case 16–CA–20247 was filed on January 4, 2000. Respondent and the General Counsel filed briefs. Upon consideration of the entire record and briefs, I make the following findings.

Respondent admitted that at material times it has been a Texas corporation, with a place of business in Glen Rose, Texas, where it has been engaged as a public utility in the business of providing electrical service; that during the past 12 months, in conducting those business operations, it derived gross revenues in excess of $250,000 and purchased and received at its Glen Rose facility goods and materials valued in excess of $50,000 directly from suppliers located outside Texas; and that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). Respondent admitted that the Charging Party has been a labor organization at material times.

Respondent admitted that the Union was certified on February 19, 1999, and that it represented employees in the following appropriate bargaining unit at material times:

> All chemistry technicians, including lead technicians, employed by Respondent at the Comanche Peak Steam Electric Station at Glen Rose, Texas.

Respondent has a large work force. There are approximately 14,000 employees in the United States. A number of those employees are technicians including the chemistry technicians in the unit. Before February 1999 about 850 employees were covered by the technicians salary plan. Of those 850 employees only 26 are in the bargaining unit.

At issue is application of Respondent's salary plan for technicians. When the Union was certified both unit and nonunit technicians were paid under Respondent's 1999 technicians salary plan. Respondent routinely reviewed its benefits. Accordingly the technicians salary plan was reviewed and on December 26, 1999, Respondent adopted a 2000 technicians salary plan. That plan was not applied to bargaining unit technicians.

The General Counsel alleged that Respondent unlawfully failed to include unit technicians in the 2000 technicians salary plan and that it threatened employees that no wage raises would be given until it and the Union agreed to a contract.

Pursuant to recommendations from human resources a policy committee routinely reviewed the total compensation package for Respondent's systemwide technicians work force. That review included consideration of its technicians salary plan. The review was routinely performed on an annual basis and involved examination of the current market conditions, company economics, the current retention of employees, and other factors. Following the policy committee report a decision was made as to whether adjustments were needed in the compensation package (Tr. 67–69). Before the end of 1999 the policy committee recommended a new technicians salary plan for 2000 and the elimination of double overtime pay and pay for overtime meals for technicians. Those recommendations were instituted as to some technicians but not to bargaining unit technicians around December 26, 1999.[2] Some unit employees received a pay increase under the 1999 salary plan. However, those unit technicians that had topped out at 100-percent job rating were not eligible for a pay increase in accord with the 1999 plan. If Respondent had applied the 2000 salary plan to unit employees those topped out unit technicians would have received a pay increase upon evaluations of commendable or above.

Respondent's labor relations coordinator, Jimmy Walker, testified that Respondent and the Union have met in negotiations approximately 20 times but have not reached agreement. During their first meeting on May 7, 1999,[3] Walker advised the Union that the current wage package plan was a status quo issue and would not change until the parties reached a collective-bargaining agreement. The Union did not object.[4] Since that time both the Union and Respondent have made several wage proposals, the Union requested information from Respondent regarding wages and the parties have exchanged letters regarding those negotiations (see R. Exhs. 5–8).

The Union submitted a proposal on June 18, 1999, which included double overtime and pay for overtime meals (R. Exh. 12). Respondent supplied the Union with information pursuant to its requests. During July 12 negotiations, the Union submitted its first wage proposal and Jimmy Walker reminded the

* Corection has been made according to an errata issued on June 15, 2000.

[1] Respondent contented that the motion to sever should be denied and, instead, the charges should be dismissed. I reject that contention.

[2] According to lead chemistry technician Shawn Flaherty every technician that was topped out at 100 percent received a pay raise each year around December 26 until 1999. Flaherty received a commendable evaluation in January 2000. Based on that evaluation he would have received a 3.6-percent increase in pay if Respondent had granted the same increase it granted to all its nonunit technician employees that were covered by the 2000 plan. Chemistry Technician Randall Walsh testified that he has received a performance review around December 26 every year since he reached the "top-out of the job-value." He received a pay increase each December 26 based on his performance review and the technicians' salary plan chart. Since voting in the Union the unit employees rated at 100 percent have not received a pay increase.

[3] Shawn Flaherty, who is a member of the union negotiating committee, admitted that Walker told the union negotiators about retaining the 1999 salary plan but he recalled that occurred in the fall of 1999. As shown below, I credit Walker in that regard.

[4] Flaherty testified that the Union did object that unit employees should receive the same raises each year as the other technicians.

Union of the May 7 discussion that the 1999 technicians salary plan would remain in effect until the parties negotiated a new agreement. On August 20, Respondent proposed elimination of doubletime and institution of time-and-one-half for overtime over 40 hours a week. Respondent submitted a wage counterproposal on October 8. Respondent's counterproposal included a potential merit based increase for career-level senior chemical operators (R. Exh. 9).

Respondent implemented its 2000 technicians salary plan to nonunit employees on December 26, 1999. There was no change in Respondent's practice of evaluating employees at the end of the year and awarding wage increases to employees[5] on the basis of those evaluations. All employees including unit employees continued to receive annual evaluations after December 26, 1999. After December 26, 1999, unit employees received evaluations and possible wage increases under the 1999 technicians salary plan while nonunit technicians received evaluations with possible pay increases under the 2000 technicians salary plan.

The Union next submitted a wage proposal on January 19, 2000. That proposal called for seniority-based pay increases. Respondent submitted a counterproposal on January 31. That proposal also included a potential merit based increase for career-level senior chemical operators and the overall pay ranged from $12.90 an hour for starting associate chemical operators to a career-level rate of $26.52 an hour for senior chemical operators after 72 months with a possible merit-based increase up to $29.87 an hour (R. Exh. 14). Respondent's October 8 counterproposal ranged from $12.45 an hour for starting associate chemical operators to a career-level rate of $25.60 an hour for senior chemical operators after 72 months with a possible merit based increase up to $28.83 an hour (R. Exh. 9).

Also on January 31 the Union submitted an overtime proposal which represented a proposed increase in the amount of hours paid at doubletime (R. Exh. 13). For example that proposal called for time-and-a-half pay for overtime but doubletime for over 12 hours a day and over 49 hours a week.

Although no new proposals were submitted the parties continued to meet in negotiations during February 2000.

Shawn Flaherty testified that Labor Relations Manager Jimmy Walker told union negotiators about the December 1999 raise. Walker told the employees they would not receive the wage increase because they were locked into the technicians salary plan of 1999. Later, Chemistry Manager Bozeman told Flaherty that pay raises were subject to negotiations and due to the status quo issue, unit employees would not receive the normal pay raises.

Randall Walsh and other unit technicians met with Chemistry Supervisor Robert Theimer at the plant in late November 1999. One of the technicians asked Theimer what the technicians' pay increase was going to be that year. Theimer replied that the wage increase did not apply to the technicians now because the wages had to be negotiated. Walsh and three or four other technicians met with Supervisor David Perkins on January 11, 2000. Walsh asked Perkins why some of the technicians received wage increases and others received no increase. Perkins said that he did not know about anyone receiving raises but he knew the technicians there were not going to receive a wage increase because of the union issue, that their pay was going to be negotiated and they would not receive an increase until there was a contract. Later that day, Perkins phoned Walsh and said that the people that weren't at 100-percent job value under the old plan would receive pay increases but anyone else would not get a raise until a contract was negotiated. Perkins said the 2000 pay plan did not apply to unit employees. Walsh did not receive a pay increase on December 26, 1999, even though he was rated commendable in his job evaluation. Under the 2000 technicians' salary increase guide[6] in accord with his work history, Walsh would have received a pay increase around December 26, 1999.

A. Findings; Credibility

There is a dispute between Shawn Flaherty and Jimmy Walker about negotiations regarding Respondent's intent to maintain its 1999 technicians salary plan for unit employees. Flaherty admitted that Walker told the union negotiators that it would continue to apply the 1999 plan to unit employees. However, he, as opposed to Walker, testified that the Union objected to Respondent continuing to apply the 1999 technicians salary plan. I was more impressed with Walker's demeanor and testimony. Walker testified in detail regarding negotiation sessions and he demonstrated actual recall of individual negotiation sessions. Flaherty did recall the Union quarreling with Respondent in December about application of the 2000 salary plan to unit employees but he did not demonstrate recall as to what was said about the status quo and the 1999 plan during May and July negotiations. In view of the full record I find that Walker first brought up the status quo matter in May and again in July. I am not surprised about the Union quarreling with Respondent in December about the 2000 salary plan since unit employees were told about the plan's implementation during that month.

Moreover, I am concerned about Flaherty's testimony that the Union decided not to file charges when first told about Respondent's belief that the 1999 plan was the status quo for unit employees but to wait to see if Respondent changed its mind. During the period when Respondent first announced its status quo plan, the Union was actively filing charges against Respondent. For example Case 16–CA–19810 was filed on March 17, and Case 16–CA–19895 was filed on May 20, 1999. It is difficult to understand why a factor as important as a wage adjustment was not included in those charges if, as Flaherty testified, the Union objected when Respondent announced its position. Instead it appears from Flaherty's testimony when considered along with that of Walker, that the Union did not actually object until after the 2000 salary plan was implemented in December. I credit the testimony of Walker including his testimony that Respondent advised the Union on more than one occasion of its intent to maintain the status quo under the 1999

[5] Unit employees were evaluated at the end of 1999 and those unit employees that were at 100-percent pay were not granted a pay increase. Under that 1999 plan, unit employees at 100-percent pay were not entitled to a pay increase regardless of their evaluations.

[6] Jt. Exh. 4, p. 11.

technicians salary plan until a collective-bargaining agreement was reached.

Randall Walsh testified about a January 11, 2000 meeting with four or five employees and Supervisor David Perkins. Perkins responded to Walsh's question as to why some technicians did not receive a pay increase. Perkins told the employees they would not get a pay raise because of the union issue and not until there was a contract (Tr. 48, 49). Perkins admitted that he told Shawn Flaherty that wage increases would be governed by the 1999 technicians salary plan. Perkins denied that he talked with Walsh about pay increases. In view of the full record I am convinced that David Perkins told employees they would not receive a pay increase under the 2000 technicians salary plan. In that regard I credit testimony that Perkins subsequently phoned Walsh that employees that were not at 100-percent job value would receive a pay increase under the 1999 technicians salary plan but that the 2000 plan did not apply to unit employees.

B. Conclusions

1. The 8(a)(1) allegations

The complaint alleged that Supervisors Theimer and Perkins threatened employees they would not receive a pay increase because of negotiations with the Union. As shown above, Theimer and Perkins did tell employees that Respondent planned to exclude unit employees from the 2000 technicians salary plan.

2. The 8(a)(1) and (5) allegations

The General Counsel contended that by failing to apply the 2000 technicians salary plan to bargaining unit employees, Respondent unilaterally changed terms and conditions of employment. Respondent contended that it did not unilaterally change terms and conditions of employment.

I credit testimony and other evidence that shows:

The Union was certified on February 19, 1999. At the time of the Union's certification, unit employees' pay was set by the 1999 technicians salary plan. The parties started negotiations on May 7, 1999. Respondent told the Union that it planned to maintain the 1999 technicians salary plan for unit employees pending agreement. The Union did not object. On May 7, it was well known by unit employees that Respondent routinely reviewed its technicians salary plan at the end of December each year. On June 18, the Union proposed, among other things, that Respondent pay double overtime and pay for overtime meals. On July 12, the Union submitted its first wage proposal and Respondent reminded the Union of its intent to maintain the 1999 technicians salary plan for unit employees pending agreement. On August 20, Respondent proposed elimination of double overtime pay and pay for overtime meals. On October 8, Respondent made a wage proposal that ranged from $12.45 an hour for starting associate chemical operators to a career-level rate of $25.60 an hour for senior chemical operators after 72 months with a possible merit based increase up to $28.83 an hour (R. Exh. 9). On and after December 26, 1999, Respondent applied a different technicians salary plan to nonunit technicians. In addition to implementation of that 2000 technicians salary plan Respondent eliminated double overtime pay and pay for overtime meals for nonunit technicians. The 2000 technicians salary plan was not applied to unit employees and there was no change in unit employees' double overtime pay and pay for overtime meals. If the 2000 plan had been applied to unit employees, those chemistry technicians rated at 100 percent would have received December 26, 1999, pay increases if evaluated at commendable or higher. Some unit employees did receive a pay increase after December 26, 1999, but those increases were granted under the 1999 technicians salary plan. The Union filed its unfair labor practice charge on January 4, 2000. The Union submitted another wage proposal on January 19 and Respondent submitted a counterproposal on January 31, 2000. The Union submitted a proposal that same day to increase the amount of hours paid at doubletime. The parties have continued to negotiate.

The General Counsel argued that Respondent's action is unlawful. Respondent failed to bargain before eliminating bargaining unit technicians from its 2000 technicians salary plan? (*Daily News of Los Angeles*, 304 NLRB 511 (1991); *Harrison Ready Mix Concrete*, 316 NLRB 242 (1995); *Lasalle Ambulance, Inc*., 327 NLRB 49 (1998). In *Daily News of Los Angeles*, the Board stated:

> *Two well–settled legal principles, both enunciated by the Supreme Court in its decision in NLBR v. Katz, 369 U.S. 736 (1962), underlie the judge's analysis. First, an employer negotiating with a newly certified bargaining representative is prohibited under Section 8(a)(5) from altering established terms and conditions of employment without first notifying and bargaining with the union. . . .*[7] [Id.; emphasis added.]

Respondent contended that it did bargain over application of its 2000 technicians salary plan to unit employees. From the Union's certification in February 1999 Respondent was faced with a dilemma regarding unit employees. At that time both Respondent and unit employees were aware of Respondent's annual practice of reviewing economic conditions including its technicians salary plan. Respondent advised the Union that it would maintain the 1999 technicians salary plan as status quo for unit employees pending negotiations and the Union did not object.

There is no dispute but that Respondent made changes in working conditions when it adopted a 2000 technicians salary plan and applied that plan to nonunit technicians on December 26, 1999. Nor is there a dispute but that Respondent continued to apply its 1999 technicians salary plan to unit employees.

There remains a question regarding bargaining. Respondent and the Union did discuss maintenance of the 1999 technicians salary plan for unit employees during collective-bargaining negotiations. I must examine whether Respondent's action in eliminating unit employees from its 2000 technicians salary

[7] The Board went on to state:

> *Finally, the dissent's conclusion that the Union in this case sought "the best of both worlds" misses the mark. What the Union sought was nothing more than what the Board and courts require the Respondent to do, namely, to maintain the existing terms and conditions of employment pending negotiated changes in past practices or an impasse in bargaining.* [Id at 512. Emphasis added.]

plan constitutes bad-faith bargaining in view of Respondent's notice to the Union and subsequent actions.

An employer may not lawfully alter "*established terms and conditions of employment without first notifying and bargaining with the union.* (*Daily News of Los Angeles*, supra). Here the employer did notify the Union and the Union did not object to Respondent announced intent to maintain the 1999 plan for unit employees.

One may ask what the Act is designed to protect regarding unilateral changes in violation of an employer's bargaining obligation. Obviously, at least one objective is to prevent an employer from unlawfully undermining the bargaining representative. If there was an instance of Respondent unlawfully undermining the Union, that occurred either in November when a supervisor told employees of Respondent's intent regarding the 2000 plan as to unit employees or in December 1999, when Respondent actually implemented its 2000 technicians salary plan. Respondent told the Union of its intent regarding unit employees several months before November and December. I credited the testimony of Jimmy Walker. Walker testified that Respondent advised the Union during May 7 and July 12, 1999, negotiations that it would continue to apply the 1999 technicians salary plan to unit employees until the parties reached a collective-bargaining agreement. When Respondent told the Union of its intent to maintain the status quo, unit employees were well aware of Respondent's annual economic review practice. Nevertheless, the Union did not object to Respondent's announced status quo plan until after[8] it and Respondent engaged in extensive negotiations over economics and after Respondent announced its 2000 technicians salary plan in December 1999.[9] Additionally, Respondent advised the Union and unit employees on the negotiating committee that it viewed continuation of the 1999 Technicians Salary Plan as necessary maintenance of the status quo for unit employees long before any supervisors told unit employees they would not receive wage increases under the 2000 technicians salary plan.[10]

Whether Respondent's May 7 action constitutes bargaining may be questioned. However, that issue was not called into question. The Union did not initially object when Respondent said it would maintain the status quo.[11] There was no demand for bargaining and, of course, there was no showing that Respondent refused to bargain about that issue. I am convinced that Respondent did what it was legally required to do at that point. Subsequently, on July 12 Respondent reminded the Union again of its intent to maintain the 1999 plan for unit employees.

If Respondent and the Union had agreed to a collective-bargaining agreement after May 7, an agreement would have resulted in unit employees being segmented from other technicians for pay purposes. If the agreement had preceded December 26 unit employees would have received benefits under the agreement before Respondent's annual review of the technicians salary plan. When Respondent first told the Union of its intent to maintain the status quo, the 1999 technicians salary plan had been in effect for only 4 months. At any time over the next 7-1/2 months, an agreement to increase unit employees salary would have preceded any pay increase for other technicians. The parties did not reach early agreement but there was no showing that was caused by any unlawful action by Respondent.

By affording the Union the opportunity to either object to its announced plan to maintain the status quo of the 1999 plan and avoid negotiating an early agreement that would precede the 2000 technicians salary plan, or, to otherwise negotiate knowing of the likelihood that Respondent would adopt a new technicians salary plan in December 1999, Respondent appeared to act in good faith.

Before December 26, 1999, the Union and Respondent also engaged in negotiations about pay and overtime. Although Respondent changed the salary plan for nonunit technician employees it also changed its double overtime and overtime meal policy. Respondent did not change those benefits for unit employees. Unit employees retained double overtime and pay for overtime meals.

In view of the above and the full record, I find that the parties did negotiate over the wages of unit employees and Respondent did not unilaterally discontinue its pay plan for unit employees. Negotiations included Respondent advising the Union of its intent to maintain the 1999 technicians salary plan for unit employees until agreement; the Union's failure to object; and several wage increase offers during bargaining from both the Union and Respondent.

The Union made several economic proposals during negotiations including proposals on June 18 and July 12, 1999, and January 19, 2000. Respondent submitted economic proposals including proposals on August 20 and October 8, 1999, and January 31, 2000.

In view of those factors I find that this case must be distinguished from *Daily News of Los Angeles*, supra, and *Harrison Ready Mix Concrete*, supra. The General Counsel and the Union's contention that Respondent bargained in bad faith is undercut by the regularity of Respondent's wage and benefits review. As shown above, in addition to being advised in May 1999 of Respondent's intent to maintain the status quo under the 1999 technicians salary plan, the unit employees were well aware of Respondent's annual wage review process. Nevertheless, the Union said nothing about applying the 2000 technicians salary plan to unit employees before the annual wage review in December 1999.

The bargaining unit composed only a small segment of those technicians covered by Respondent's technicians salary plan. Some 850 technician employees were covered by the 1999 plan including the 26 unit employees. The 2000 policy committee recommended increased wages for those remaining 850 techni-

[8] Respondent filed the charge in this matter on January 4, 2000.

[9] See *NLRB v. Rochester Institute of Technology*, 724 F.2d 9 (2d Cir. 1983).

[10] Shawn Flaherty admitted that Respondent's negotiators told union negotiators of its plan to continue the 1999 plan in the fall of 1999. Jimmy Walker credibly testified that he told the union negotiators of Respondent's plan to continue application of the 1999 plan during May 1999 negotiations.

[11] According to Flaherty's testimony the Union argued with Respondent about unit employees not being included in the 2000-salary plan in December. The Union filed the charge herein on January 4, 2000.

cians but as to those that had topped out at 100 percent, the wage increase depended on each one receiving an evaluation of commendable or above. Moreover, all those remaining nonunit technicians lost benefits. Respondent eliminated their double overtime pay and pay for overtime meals. As to unit employees, those that were eligible under the 1999 technicians salary plan received a pay increase and no unit employee suffered loss of double overtime pay or pay for overtime meals.

Respondent did not unilaterally withhold a pay increase without bargaining with the Union.

The General Counsel argued that Respondent failed to meet the standard set out in *Lasalle Ambulance, Inc.*, 327 NLRB 49 (1998), regardless of whether Respondent proposed continuation of the 1999 plan to unit employees. There, the Board held that an employer may not lawfully depart from an established practice absent negotiations with, and agreement by, the union or unless the parties reached impasse during good-faith bargaining.

However, *Lasalle Ambulance* involved several factors that are not present here. In *Lasalle*, the employer threatened to withhold performance reviews and merit increases if the union was voted in during a NLRB election. Here, there was no showing that Respondent engaged in unfair labor practices in order to defeat the Union during an election.

In cases including some cited by the General Counsel, the Board has reacted to efforts to undercut one party during negotiations. Oftentimes, an employer acts to undercut a union by showing that nonunit employees are treated better than those in a bargaining unit. Here, that appears to be the case as of December 26, 1999. However, it is important to consider that Respondent advised the Union of its plan in that regard on May 7, 1999. At that time it was well known among unit employees that Respondent routinely studied its pay and benefits for technicians at the end of each year. On May 7, both Respondent and the Union faced a dilemma. The dilemma of whether unit employees would or would not fall within the 2000 technicians salary plan. Respondent announced its intent in that regard. The Union did not object but it also did not specifically agree. Nor did the Union advance any alternative to Respondent's proposal. Instead, the Union remained silent and waited 7 months before filing charges. It appears from that action that the Union sought to capitalize on Respondent's dilemma. Perhaps the Union wanted to be in position to resist agreement until Respondent instituted its 2000 technicians salary plan. If its charge was found to be meritorious, it could receive back wages for unit employees and negotiate from the 2000 technicians salary plan.

The record failed to show bad faith in Respondent's actions. The credited testimony showed that Respondent and the Union started negotiations on May 7 after an election on February 7, 1999. Some 20 negotiation session had been held before the hearing and both parties had made proposals including wage proposals. During those negotiations Respondent was faced with difficult economic dilemmas. Respondent faced questions including economics and employee retention in consideration of some 850 technicians. At the same time Respondent was negotiating in apparent good faith regarding 26 bargaining unit employees. Respondent's review of nonunit employee conditions resulted in some increased wages but it also resulted in savings for Respondent through elimination of double-overtime pay and pay for overtime meals. All those issues were also being discussed with the Union in bargaining unit negotiations.

I am convinced that Respondent did not act unlawfully by continuing to apply the 1999 technicians salary plan to unit employees after it adopted a new plan for some of its other technician employees and that comments by supervisors Theimer and Perkins were protected under Section 8(c) of the Act. Both those supervisors advised employees of Respondent's intent to not apply the 2000 plan to unit employees.

I recommend that the complaint be dismissed.

Dated at Washington, D.C. June 9, 2000